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NO. 00-538

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

Kathleen Griest and George Griest,
Petitioners

v.

Andrew Edward Canepa, P.S.P.; Jeffrey E. Hontz, P.S.P.; Commonwealth of Pennsylvania; Paul J. Evanko, the Commissioner of the Pennsylvania State Police in His Individual Capacity; Glen Walp, the Former Commissioner of the Pennsylvania State Police in His Individual Capacity,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995) requires a circuit court to decline the exercise of jurisdiction on an appeal of the denial of summary judgment on a qualified immunity defense, when the denial is the result of the existence of controverted issues of fact.

2. Whether an inquiry into the subjective intent of a government official is appropriate for the purpose of determining whether an official is entitled to qualified immunity in a First Amendment retaliation case against a government official.

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STATEMENT OF THE CASE

This is a civil rights action brought by Petitioner Kathleen Griest and her husband, George Griest (together referred to as Petitioners), against two state police officers, Andrew Canepa and Jeffrey Hontz, who are the Respondents.[1] Petitioners claim that Trooper Canepa unlawfully took Mrs. Griest into custody and used excessive force against her in the process, and that Trooper Hontz violated her rights by filing charges against her concerning the incident in retaliation for her notification of intent to sue. The issue in this case is whether the Court of Appeals was correct in concluding that Trooper Canepa was entitled to qualified immunity on the wrongful arrest claim and that Trooper Hontz was similarly entitled to immunity on the malicious prosecution claim.

1. On April 12, 1995, Mrs. Griest was treated for an abscessed tooth, and subsequently suffered from nausea, vomiting and pain. The next day she called her doctor complaining about the symptoms and he told her to go to the hospital. *C.A. App. 422.*[2] Mrs. Griest then began to drive herself to the hospital, accompanied by her 42 year old daughter, Kathleen Williams, who had stayed with her overnight on account of her illness. During the trip, Mrs. Griest was in sufficient distress that she pulled over in front of an unmarked police car that had run out of gas and was parked

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[1]Petitioner also sued the Commissioner of the Pennsylvania State Police, Paul J. Evanko, and the former Commissioner, Glenn Walp, as well as the Commonwealth itself, but these parties were dismissed by stipulation are not the subject of this petition.

[2]Citations are to the Appendix filed in the Court of Appeals (C.A. App.) and to the Appendix to the Petition (Pet. App.)

on the berm of the four lane, limited access highway. (*C.A. App. 484).* Mrs. Griest's daughter told Trooper Canepa, who was in the car, that her mother was sick. *C.A. App. 484.* Trooper Canepa approached the car, identified himself as a police officer, and suggested to Mrs. Griest that she let her daughter drive her to the hospital. *C.A. App. 485.* Mrs. Griest refused, and after twice asking Mrs. Griest for the keys, Trooper Canepa removed them from the ignition. *C.A. App. 365.* Mrs. Griest, dressed in a housecoat, overcoat, and bedroom slippers, then got out of the car, said that she would walk to the hospital, and began walking. *C.A. App. 1213-1214, 1248.* Trooper Canepa then handcuffed her briefly, took her into custody, and she was taken to the hospital in an ambulance after his partner arrived. Mrs. Griest said that Trooper Canepa handcuffed her for no reason, he says that he did so only after she repeatedly struck him. *C.A. App. 432, 676.* In any case, Trooper Canepa sustained a minor injury to his thumb that he says Mrs. Griest caused.

Trooper Hontz arrived after the ambulance and was given the task of investigating the incident and preparing aggravated assault charged against Mrs. Griest because of the injury she caused Trooper Canepa. *C.A. App. 728-729.* Trooper Hontz did not witness the incident himself, but interviewed Trooper Canepa and Mrs. Griest's family doctor, who told him that he was concerned about septicemia, a serious systemic infection. *C.A. App. 212-213.* Trooper Canepa put his investigation on hold for three and a half months, then called the doctor again and was told that Mrs. Griest was still undergoing treatment and that an arrest might set her back. *C.A. App. 214.* Hontz then checked with the District Attorney's Office who told him to "sit on" his investigation and get back to them. *C.A. App. 214.*

About two months later, Mrs. Griest notified the state police of her intention of bringing a lawsuit in connection with the incident. *C.A. App. 1051*. Trooper Hontz' superiors then advised him to resolve the matter with the District Attorney's Office by October 25, 1995. *C.A. App. 249-258*. Trooper Hontz discussed the matter with an Assistant District Attorney who told him to file charges. *C.A. App. 795*. Trooper Hontz filed charges of simple assault and disorderly conduct, and Mrs. Griest was found not guilty after a summary trial because the District Justice concluded that, although Trooper Canepa was the more credible witness, Mrs. Griest could not have formed the level of intent necessary to support the charges, on account of her agitated mental state.[3]

2. Petitioners brought suit against Troopers Hontz and Canepa asserting federal and state claims for use of excessive force and assault and battery, false arrest and false imprisonment, malicious prosecution, and unlawful retaliation. Mr. Griest asserted separate state law claims for emotional distress because he observed "substantial portions" of the actions against his wife and for loss of consortium.

The Respondents moved for summary judgment on all claims asserting qualified immunity, and the Petitioners moved for partial summary judgment on the retaliatory prosecution claim. The district court denied the Petitioners' motion for partial summary judgment and granted the Respondents' motion in part. The court outlined the factual assertions of the parties, and then determined that summary judgment was appropriate

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[3]Trooper Hontz initially charged Mrs. Griest with aggravated assault and two simple assault charges, but the charges were reduced because the district justice refused to approve the aggravated assault charge.

only as to the pendent state claims and not as to the federal claims. The court did not identify specific disputes of material facts to support its action, but said that "there is myriad of disputed facts going to the question of the reasonableness of Canepa in arresting Kathleen Griest and the force used in connection therewith," *Pet. App. A-44*, and "whether Hontz's action in bringing the charges were objectively reasonable presents questions of fact for the jury." *Pet. App. A-43*. The district court denied petitioners' motions for summary judgment on qualified immunity.

3. The Court of Appeals affirmed in part and reversed in part. The court began by considering whether it had jurisdiction over the appeal, concluding that it did because "the defendants are not contesting the facts but, rather, are willing to concede Griest's version, and thus we have jurisdiction to hear this appeal under 28 U.S.C. §1291 pursuant to the collateral order doctrine." *Pet. App. A-4 (citation omitted)*. The court went on to conclude that Canepa was entitled to summary judgment on Griest's Fourth Amendment claim of unlawful arrest because "even under Griest's version of the facts no rational jury could determine that Canepa committed a Fourth Amendment violation by taking Griest's keys and preventing her from walking down the highway to the hospital. Viewing the evidence in the light most favorable to Griest, it is clear that Canepa was merely preventing Griest from hurting herself, and perhaps others, in a potentially dangerous situation." *Pet. App. A-8*. Even had a Fourth Amendment violation occurred, the Court said that Canepa would be entitled to qualified immunity because Griest's "right to be free in that setting [was] not clearly established," and because "it was objectively reasonable for Canepa to believe that it was lawful (perhaps even mandatory) to prevent a very

sick woman from driving or walking down the shoulder of the highway early in the morning." *Pet. App. A-9.*

The Court of Appeals also concluded that Hontz was entitled to qualified immunity on Griest's claim that he filed charges against her in retaliation for her exercise of her First Amendment rights. The court acknowledged that the claim was "complicated by the fact that the retaliation claim involves motive or animus," *Pet. App. A-13*, but concluded that the timing of the charges alone was insufficient to show retaliation because Hontz offered uncontroverted evidence that he relied on direction from the District Attorney's Office as to the timing of the charges, and that it was objectively reasonable for Hontz to rely on Canepa's statements concerning the incident to conclude that there was probable cause to file the charges. *Pet. App. A-17-18.* The Court of Appeals also said that no rational jury could draw an inference of retaliatory motive based on inaccuracies in the affidavit of probable cause identified by Griest because, even if credited, the discrepancies were not material to the charges. *Pet. App. A-17.*

As to the excessive force claim against Canepa, however, the Court of Appeals concluded that the district court properly denied the motion for summary judgment. Again, assuming Griest's version of the facts, the Court determined it was "appropriate for a jury to determine in the first instance whether the force used by Canepa was excessive," because her version "contains within it some genuine disputes as to the precise sequence of events and the degree of resistance, or aggression, she asserted." *Pet. App. A-10.*

REASONS FOR DENYING THE WRIT

The Court should deny the writ because the Court of Appeals' decision is unremarkable, clearly correct, and because it presents squarely neither of the questions framed by the Petitioners. There is no important issue to resolve here, only the Petitioners' disagreement with the Court of Appeals' interpretation of the record, and this surely does not present an issue for certiorari.

A. The Court of Appeals' Decision Is Not at Odds with *Johnson* or Decisions from Other Circuits.

Despite the implication in the first question framed by Petitioners, the Court of Appeals did not exercise appellate jurisdiction over an order denying summary judgment based on qualified immunity despite "the existence of controverted issues of fact." *Pet. i.* Rather, the Court of Appeals apparently recognized at the outset that it could not do this, but said that "the defendants are not contesting the facts but, rather, are willing to concede Griest's version, and thus we have jurisdiction to hear this appeal . . .." *Pet. App. A-4.* Thus, the decision is not at all at odds with this Court's holding in *Johnson v. Jones*, 515 U.S. 304 (1995), as Petitioners suggest it is. *Johnson* certainly did not suggest that a Court of Appeals is powerless to entertain an appeal raising issues of qualified immunity when it is prepared to measure the objective reasonableness of the defendants' actions against the facts as presented by the plaintiffs.

Thus, any conflict among the circuits on this point is illusory. In *Martinez v. Simonetti*, 202 F.3d 625 (2d Cir. 2000), for example, the Court held, as did the Court of

of fact preclude summary judgment on qualified immunity does not foreclose appellate review "if the defendant contends that [she] is entitled to qualified immunity even under plaintiff's version of the facts." 202 F.3d at 632. In *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000), the Court declined to exercise jurisdiction over the appeal of the issues as framed by the defendants, but suggested that, had they accepted the allegations of the plaintiff as true for purposes of summary judgment, whether that conduct violated clearly established law would be a legal conclusion regarding qualified immunity that would be immediately appealable. 204 F.3d at 13. In another group of cases, appeals were rejected because the courts of appeals recognized that the issue of qualified immunity as framed by defendants was dependent on an assessment of whether or not certain conduct actually occurred, *Monterose v. Harrison*, 211 F.3d 1265 (4th Cir. 2000), or on a factual dispute as to the reasons for an action, *Ruffine v. Sheahan*, 218 F.3d 697 (7th Cir. 2000) (appeals court agreed with trial court that resolution of qualified immunity turned on disputed issues of fact). *See also Thibodeaux v. Harris County, Texas*, 215 F.3d 540 (5th Cir. 2000) (significant fact related disputes).

In still other cases cited by Petitioners, courts have rejected appeals because they determined that the appeal on qualified immunity would require them to review rulings on evidentiary sufficiency. In *Dyer v. County of Suffolk*, 213 F.3d 626 (2d Cir. 2000), the Court said that review was foreclosed because "the defendants do not accept the plaintiff's version of the facts for purposes of the appeal. Rather, they vigorously contest several of the plaintiff's factual assertions." *See also Shinnhault v. Cleveland County Board of Commissioners*, 82 F.3d 367 (1996), *cert. denied*, 519 U.S. 1078 (1997) (defendant contested district court's factual determination).

Finally, in *Boyd v. Baeppler*, 215 F.3d 594 (6th Cir. 2000), the Court of Appeals recognized that the district court had identified factual conflicts, but accepted the appeal nonetheless because the conflicts were not material to the issue of qualified immunity.

Contrary to petitioner's assertion, these decisions are not in conflict, nor do they reflect any confusion about whether an appeals court should hear an appeal from a denial of a motion for summary judgment on qualified immunity when facts material to the motion are in dispute. To the contrary, they are in agreement with the court in this case that it should not. Thus, there is no need for the Court to take this case to resolve any doctrinal dispute.

B. The Court of Appeals' Decision Does Not Turn on the Issue of Whether Subjective Intent Applies to the Analysis of Qualified Immunity in First Amendment Retaliation Claims.

The second question framed for certiorari, like the first, is not properly presented by the decision in this case. Petitioners frame the second issue as "whether an inquiry into the subjective intent of a government official is appropriate for determining whether an official is entitled to qualified immunity in a First Amendment retaliation case against a government official." Petitioners argue that it is. The Court of Appeals agreed with them, recognizing that the determination of qualified immunity in this context was complicated "by the fact that the retaliation claim involves motive or animus." *Pet. App. A-13*, but held that qualified

immunity could still be proper if "a reasonable officer in Hontz's position could have believed his motive was proper." *Pet. App. A-14.* Petitioners have cited to no split among the circuits on this point, and their disagreement, once again, seems with the Court of Appeals' interpretation of the record rather than with any principle of law.

The Court of Appeals said that Trooper Hontz had presented uncontroverted evidence that he took the action he did — filing charges against Griest — based on information given him by Canepa and at the direction of the District Attorney's Office. The court concluded that the evidence presented by Griest — which consisted solely of the timing of the filing of charges and a disagreement with certain facts not material to them in the affidavit of probable cause, was not such that any reasonable jury could have concluded that Hontz acted unreasonably. "[W]e do not see any facts of record, even viewed in the light most 'favorable to Griest, that could prove causation or that would preclude the recognition of qualified immunity to Hontz for his conduct in filing the charges against Griest." *Pet. App. A-18.* Thus, the case does not turn on the issue of how subjective intent figures into the analysis of qualified immunity in the context of retaliation claims. This case is therefore not an appropriate one for the Court to revisit the question it left unanswered in *Crawford-El v. Britton*, 523 U.S. 574 (1998). The question that case was whether in a First Amendment retaliation case against a government official, the official is entitled to qualified immunity if she asserts a legitimate justification for the allegedly retaliatory act and that justification would have been a reasonable basis for the act, "even if evidence, — no matter how strong — shows the official's actual reason for the act was unconstitutional" 523 U.S. at 602 (Rehnquist, C.J., dissenting). Here the Court of Appeals said there was no evidence to prove causation or to

demonstrate that Trooper Hontz had acted unreasonably, and there is no question for the Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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